

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY JO COMBS)	
)	
VS.)	
)	
AMERICAN METAL PRODUCTS)	Docket Nos. 180,681
)	180,682
Respondent)	
AND)	
)	
COMMERCIAL UNION INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On the 22nd day of February, 1996, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Alvin E. Witwer on October 10, 1995, came regularly on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, Diane Barger of Emporia, Kansas. Respondent, American Metal Products, and its insurance carrier, Commerical Union Insurance Company, appeared by and through their attorney, Kip A. Kubin of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Derek R. Chappell of Ottawa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

Additional issues raised before the Administrative Law Judge but not appealed to the Appeals Board are affirmed by the Appeals Board per the Award of the Administrative Law Judge as if fully set forth herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant was hired March 30, 1990 and it has been stipulated by the parties that she suffered accidental injury arising out of and in the course of her employment with respondent: first, on February 2, 1993 and later on April 15, 1993. The Administrative Law Judge found in Docket No. 180,682, with an injury date of February 2, 1993, the claimant suffered a 9 percent permanent partial impairment of function to the body as a whole. This finding has not been appealed by the parties, and is affirmed by the Appeals Board. The parties have stipulated in Docket No. 180,681, with an injury date of April 15, 1993, claimant has suffered an 8 percent permanent partial impairment of function to the body as whole.

The remaining issue is whether claimant is entitled to a work disability stemming from these injuries. Subsequent to suffering multiple accidents which led to the above-described injuries, claimant experienced ongoing back and shoulder pain which interferes with her daily activities. She is limited in her ability to stoop, sit and walk. She was returned to work light duty in the respondent's impregnation room, but was terminated June 18, 1993 as part of a general company layoff. The Appeals Board finds, for purposes of this Award, claimant has suffered accidental injury on the above date stipulated and is entitled in Docket No. 180,682 to a 9 percent whole body functional impairment through June 18, 1993. The Appeals Board further finds in Docket No. 180,681 claimant is entitled to an 8 percent whole body functional impairment as a result of the injuries suffered on April 15, 1993 through June 18, 1993. The Appeals Board further finds claimant is entitled to a work disability after the date of lay off June 18, 1993. See Lee v. Boeing Co. - Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

In proceedings under the Workers Compensation Act, the burden of proof is on the claimant to establish an award of compensation by proving the various conditions on which

the claimant's right depends by a preponderance of the credible evidence. K.S.A. 44-501; K.S.A. 44-508(g); see also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by the medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

K.S.A. 1992 Supp. 44-510e(a) states in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment.”

The medical evidence, in particular that of Dr. Roger Hood, supports claimant's contention that she is entitled to a work disability in these cases. While Dr. Hood did not assign specific work restrictions to claimant, he did have the opportunity to review the restrictions of other medical providers and agreed claimant should be restricted against repetitive use of her right upper extremity.

The only evidence in the record which deals with claimant's loss of access to the open labor market and loss of ability to earn comparable wages is presented through the testimony of Bud Langston. Mr. Langston, in evaluating claimant's injuries, felt claimant capable of earning \$4.50 to \$5.50 an hour on a 40-hour week. Mr. Langston opined claimant has suffered a 4 percent loss of her ability to earn comparable wages.

Mr. Langston further opined claimant had suffered a 56 percent loss of ability to access the open labor market as a result of her injuries suffered at American Metal Products.

The Appeals Board is asked to separate the two injuries, one to the right shoulder and one to the back, for purpose of work disability. Unfortunately, the evidence does not lend itself to separate awards and, as such, claimant is not entitled to separate work disabilities for the shoulder and back injuries. Instead, following the logic and analysis of the Appeals Board in Abrams v. Rema Bakeware, Docket No. 165,279, (February 1996), the Appeals Board finds that claimant's disability subsequent to her termination results from a combination of both injuries, thus, entitling claimant to one work disability. In reviewing the evidence, the Appeals Board finds that the 4 percent loss of claimant's ability

to earn comparable wages, when combined with claimant's 56 percent loss of access to the open labor market results in a 30 percent permanent partial general body work disability. This computation follows the analysis found in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

The Appeals Board finds that functional impairment shall be the basis for permanent partial general disability benefits for both the claimant's shoulder injury and back injury until the claimant was laid off on June 18, 1993. Thereafter, permanent restrictions from both injuries combine for claimant's work disability with the date of claimant's back injury, April 15, 1993, being the date of injury for determining the permanent partial general disability limitation of 415 weeks.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer shall be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Terry Jo Combs, and against the respondent, American Metal Products, and its insurance carrier, Commercial Union Insurance Company, and the Kansas Workers Compensation Fund for accidental injuries occurring on February 2, 1993 and April 15, 1993, and based upon an average weekly wage of \$277.59, as follows:

DOCKET NO. 180,682 - DATE OF ACCIDENT FEBRUARY 2, 1993

Claimant is entitled to 71.57 weeks permanent partial functional disability at the rate of \$16.65 per week totalling \$1,191.64, for a 9% whole body functional impairment, with benefits ordered paid through June 18, 1994;

DOCKET NO. 180,681 - DATE OF ACCIDENT APRIL 15, 1993

Claimant is entitled to 61.29 weeks permanent partial functional disability at the rate of \$14.81 per week totalling \$907.70 for an 8% whole body functional impairment, with payments ordered paid through June 18, 1994;

DOCKET NOS. 180,682 AND 180,681

Thereafter claimant is entitled to 353.71 weeks permanent partial general body disability at the rate of \$55.52 per week totalling \$19,637.98 for a 30% permanent partial

general body work disability with payments to begin June 19, 1994, for a total award of \$21,737.32.

As of March 19, 1996, claimant would be entitled to 71.57 weeks permanent partial functional disability at the rate of \$16.65 per week totalling \$1,191.64 and 61.29 weeks functional disability the rate of \$14.81 per week totalling \$907.70 followed by 91.43 weeks permanent partial general body work disability at the rate of \$55.52 per week, totalling \$5,076.19 for a total of \$7,175.53 which is due and owing in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 262.28 weeks permanent partial general body work disability at the rate of \$55.52 per week totalling \$14,561.79 until fully paid or until further order of the Director.

Additional issues decided by the Administrative Law Judge but not appealed to the Appeals Board are hereby affirmed by the Appeals Board insofar as they are not inconsistent with the findings and conclusions contained in this decision.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed 75% against the respondent/insurance carrier and 25% against the Kansas Workers Compensation Fund as follows:

Hostetler & Associates, Inc.	\$371.30
Nora Lyon & Associates	\$129.80
Appino & Biggs Reporting Service	\$455.80

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissent from the decision of the majority:

The Kansas Workers Compensation Act allows a work disability of 415 weeks for each injury. Based upon the evidence in this case, the most just method of compensating claimant for the injuries suffered without unduly penalizing either party, is to grant claimant functional impairments to both the shoulder and the back through claimant's termination of employment on June 18, 1994. Thereafter, claimant would be entitled to a 30 percent whole body work disability for a period to run 415 weeks from February 2, 1993. As of that date, the award for claimant's shoulder would cease and the award would continue based solely upon injuries suffered to claimant's low back.

It is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. The testimony of Mr. Langston supports only a combination work disability when viewing the restrictions to both the shoulder and the back. The evidence presented does not permit the finder of fact to separate the restrictions of the shoulder from those for the back and assess work disability separately. Had evidence been presented to clearly separate the two injuries from a work disability standpoint, the Appeals Board would have been able to award claimant work disability as a result of the injuries suffered to her back separate from that of the shoulder. That evidence was not contained in the record. Therefore, subsequent to 415 weeks from February 2, 1993, claimant should be entitled to a functional disability only based upon her functional impairment to the back of 8 percent.

The majority, in awarding claimant a work disability utilizing the date of injury to claimant's back, has provided claimant an excessive award which, in effect, exceeds 415 weeks for the shoulder.

BOARD MEMBER

BOARD MEMBER

c: Diane Barger, Emporia, KS
Kip A. Kubin, Overland Park, KS
Derek R. Chappell, Ottawa, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director